IN THE

Supreme Court of the United States

October Term, 1977
No. 76-1797

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Corporation,

Petitioner,

vs.

RONALD DEAN JOHNSON,

Respondent.

Brief of Plaintiff-Respondent Ronald Dean Johnson in Opposition to Writ of Certiorari.

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Brief of Plaintiff-Respondent Ronald Dean Johnson in Opposition to Writ of Certiorari.

Plaintiff-respondent Ronald Dean Johnson respectfully responds to the Petition of Petitioner for a Writ of Certiorari as follows:

I
OPINION BELOW.

Petitioner's statement of the foregoing (Petition at p. 2) is not disputed.

II
JURISDICTION.

Respondent submits, as will be hereinafter demonstrated in detail, that petitioner's statement that its petition presents federal questions "of substantial importance in the correct and uniform administration of

the Federal Employers' Liability Act" (Petition at p. 3) is wholly false. The so-called questions petitioner professes to raise are not presented in this case (see III, *infra*), are not of any importance and do not involve any question of uniformity.

III

QUESTIONS PRESENTED.

A. The first alleged "question" presented by the subject petition is, in reality, as follows: where, as here, the evidence establishes that plaintiff's injuries were caused by defendant's violations of the provisions of the Federal Safety Appliances Act and of Regulations promulgated pursuant thereto, is the question of the presence or absence of evidence of contributory negligence on the part of plaintiff of any materiality? (See Opinion of the California Court of Appeal, annexed as Appendix A to the Petition, at pp. 5-7). The application of the standard for determining whether the facts disclose an issue of contributory negligence, which petitioner professes to state as the question (Petition at p. 3), is not a material question in this case and cannot be considered as meriting the attention of any appellate court, much less this Court.

B. The second alleged question presented is whether the Trial Court's refusal, in accordance with State law and practice, to give a redundant and superfluous instruction with respect to the non-taxability of awards requires that a judgment be reversed. The question is *not,* as petitioner professes (Petition at pp. 3-4), whether the instruction on non-taxability should be given. It is, rather, if, regardless of whether or not such an instruction should be given, the refusal to give it constitutes grounds for overturning this judgment

(and numerous other judgments rendered in the California Courts in FELA and Jones Act cases in which the instruction was not given, in reliance on hitherto well-settled authority. See VII B, *infra*). While there may be a division on the subject of whether there should be a *prospective* rule requiring the instruction to be given in future cases, *the authorities are uniform* that the refusal to give it is harmless and innocuous and does not constitute grounds for reversal (Point VII B, *infra*).

IV

STATUTES INVOLVED.

Petitioner has omitted to advise this Court that apart from the statutes petitioner has set forth which it claims are involved (Petition at p. 4), there is also involved herein a Regulation contained in §231.6(a)(3)(i) of Part 231 of Title 49 of the Code of Federal Regulations, which was issued pursuant to 45 U.S.C. §12. The text of said Regulation and of said statute is set forth in Appendix I.

V

APPLICATION FOR DAMAGES FOR DELAY UNDER RULE 56(4).

Plaintiff-respondent suffered the crippling and disabling injuries which are the subject of this case on October 8, 1971 [R.T. 119, 158]. His action was tried in the Superior Court of the County of San Francisco, State of California. Verdict in the sum of $460,575.13 was rendered on January 22, 1975 [Cl. Tr. 32, 343]. Petitioner moved for a new trial on February 13, 1975 [Cl. Tr. 345], and on March

28, 1975, the Trial Court denied said motion [Cl. Tr. 411].

Petitioner then filed a Notice of Appeal, and filed its Opening Brief to the California Court of Appeal, First Appellate District, Division Four, on or about March 24, 1976, fourteen months after the verdict was rendered. After Respondent's Brief was filed, petitioner filed its Reply Brief on or about November 19, 1976, almost two years after the verdict was rendered.

The California Court of Appeal filed its unamimous opinion affirming the judgment on January 27, 1977 (Appendix A, annexed to petitioner's petition, at p. 12). Petitioner petitioned for a rehearing, which was denied on February 18, 1977 (Appendix B, annexed to petition). Petitioner petitioned the California Supreme Court for a hearing, which was unanimously denied *on March 24, 1977* (Appendix C, annexed to petition).

On March 31, 1977, petitioner moved in the California Court of Appeal to stay issuance of the remittitur *for a period of sixty days* (Appendix II, annexed hereto, at p. 3, lines 16-17) in order to further postpone payment of the subject judgment, using the pretext of a proposed petition to this Court as the alleged reason for seeking such stay. On April 26, 1977, the Court of Appeal denied the motion (see Appendix III, annexed hereto).

On April 27, 1977, petitioner applied to Associate Justice Rehnquist for a stay of remittitur and stay of execution of judgment, *representing that it would file a petition for Writ of Certiorari to this Court within thirty days* after the stay request was granted

(see Appendix IV at p. 6, 7th and 8th lines). On April 28, 1977, Mr. Justice Rehnquist denied the application for a stay (see Appendix V).

On May 3, 1977, the Court of Appeal issued its remittitur, permitting respondent to execute on the judgment.

Petitioner thereafter again applied for a stay, this time to the Trial Court, the Superior Court of the County of San Francisco. Said Court indicated to counsel that it would grant said stay, and thereafter issued an order, pursuant to stipulation of the parties. A copy of this order is annexed hereto as Appendix VI. Pursuant to this order, petitioner was permitted to retain for itself, and withhold from respondent, the major portion of the subject judgment.

Although petitioner had already fully briefed the issues in this case in briefs before the California Trial Court, Court of Appeal and Supreme Court; although petitioner represented in the above-referred to documents (Appendices II and IV) that it would file its petition for a writ to this Court *by May of this year;* and although petitioner's petition is but fourteen pages in length, contains nothing new, is largely a rehash of the arguments it urged in the California Courts and could not possibly have taken more than a few days to prepare, petitioner did not file its instant petition *until June 16, 1977,* within one week of the final date permitted by the Rules.[1] Our understanding is that had petitioner complied with its prior representations to the California Court of Appeal and to Justice Rehnquist, and filed its petition within the time originally represented, said petition could have been heard

[1]We did not receive copies thereof until June 18, 1977.

and disposed of in June, 1977. By artfully delaying until the last possible moment, however, petitioner has managed to postpone consideration of its petition until October—a delay of some four months for no reason at all, except a purpose on the part of petitioner to arrogate to itself the use of the moneys for this period, and to withhold said moneys from respondent as long as possible.

Rule 56, subdivision 4 of the Rules of this Court, states:

> "Where a petition for writ of certiorari has been filed, and there appears to be no ground for granting such a writ, the court may, in appropriate cases, adjudge to the respondent reasonable damages for his delay."

Under California law, the interest on unpaid judgments is 7% (4 Witkin, "California Procedure" [2d ed.] "Judgment", §§136-137, pp. 3284-3285). The current interest rate available to petitioner and, indeed, even to respondent, is appreciably greater than that. We therefore respectfully submit that this Court should award respondent damages for his delay, and should order a reference to determine the amount thereof.

For, as we shall now show, there is no ground whatever for the granting of the instant petition.

VI
STATEMENT OF THE CASE.

On the date of the accident, October 8, 1971, plaintiff was working as a field man for defendant [R.T. 119, 158]. As such, he was part of a switching crew, whose function was to place various railroad cars on various tracks [R.T. 157, 158, 160-161].

During the course of switching operations that day, plaintiff had in his charge a 150,000 pound bulkhead flatcar [R.T. 121, 123, 200] and a railroad boxcar, which was coupled to the flatcar [R.T. 120, 121, 122, 126, 165, 177, 180]. These two cars were on an incline, and petitioner's working procedure was to have these cars stopped from rolling by placing "chocks," *i.e.*, 8 to 10 inch long 2 by 2's, under the train wheels [R.T. 120, 121, 162-163, 181-182, 200].

Plaintiff attempted to hold the cars by this method, but the cars splintered the chocks, rolled over them and "took off down the track" [R.T. 121. See also R.T. 120, 181, 200]. Plaintiff then twice more attempted to stop the cars with the chocks, but the same thing happened and the cars kept rolling [R.T. 121, 181].

Plaintiff therefore boarded the bulkhead flatcar, in order to brake it, and thus prevent the flatcar and boxcar from rolling down the track and colliding with other railroad cars stationed on the track [R.T. 120, 121, 122, 124, 126, 127, 165, 182]. This action was dictated by respondent's rules which required employees to attempt to protect respondent's property, and to stop cars going downgrade [R.T. 120, 201].

The bulkhead flatcar was flat, with two ends approximately 8 to 10 feet high [R.T. 124]. The brake was a staff brake, consisting of a post in a vertical position and a wheel on top in a horizontal position [R.T. 124, 174, 280]. Plaintiff placed his left foot inside the bulkhead on a ledge 2 inches in width and his right foot on the bulkhead sill [R.T. 127, 142, 183]. There was no brake platform or other means afforded to enable plaintiff to have secure footing [R.T. 124-125, 126, 127, 135, 142].

Once on the flatcar, plaintiff moved the wheel clockwise to attempt to apply the brake [R.T. 127, 143, 183]. However, the wheel moved only half a turn and then stuck [R.T. 127, 142, 183, 185, 186]. Plaintiff then moved the wheel counterclockwise a little bit, and then clockwise again, to try to loosen the wheel and complete the braking operation [R.T. 127, 128, 143, 183-184, 185, 186, 201, 202]. He repeated these movements back and forth several times, without success [R.T. 128, 143, 183-184, 185, 186, 202]. Then, while he was again exerting pressure and struggling to move the brake, it suddenly came loose and spun around, throwing him off balance [R.T. 128, 143, 144, 299-300]. He fell down between the cars and suffered the crippling injuries which are the subject of this lawsuit [R.T. 144, 145].

VII

THE INSTANT PETITION IS WITHOUT MERIT.

A.

1. The Evidence Clearly Established Two Separate Violations of the Safety Appliances Act, as to Which Contributory Negligence Is No Defense. Hence, the Question of Whether or Not Evidence of Contributory Negligence Existed Is Immaterial and Furnishes No Basis Whatever for This Court to Grant the Instant Petition.

The Safety Appliances Act requires that all railroad cars "must be equipped with . . . efficient hand brakes." (45 U.S.C. §11). The evidence summarized above demonstrates that the brake involved herein was *not* an efficient hand brake, since it did not operate on application, but rather stuck and then suddenly released [R.T. 143-144, 213-214, 224-225].

Additionally, the above evidence establishes that appellant violated the above-cited Regulation issued pursuant to the Safety Appliances Act. A violation of such a Regulation renders the carrier absolutely liable in the same manner as a violation of the statute itself. See *Urie v. Thompson*, 337 U.S. 163, 191; *Lilly v. Grand Trunk W.R. Co.*, 317 U.S. 481, 488.

Said Regulation required that every hand brake on a flatcar shall be so located "that it can be *safely operated while car is in motion*" (§231.6[a][3][i] of Part 231 to Title 49 of the Code of Federal Regulations, set forth in App. I, *infra* [emphasis added]). The overwhelming evidence established that the brake on the subject flatcar could not be safely operated while said car was in motion, because there was no place on the flatcar where the operator could securely plant his feet while operating the brake [R.T. 209-210, 212, 215, 220, 225, 227]. A violation of the foregoing Regulation promulgated pursuant to the Safety Appliances Act was thus clearly established.

Contributory negligence is, of course, not a defense to either of the foregoing violations of the Safety Appliances Act. 45 U.S.C. §53. Thus, the question of plaintiff's contributory negligence was wholly irrelevant and immaterial to plaintiff's right to recover for the injuries he sustained as a result of said Safety Appliances Act violations.

The only manner in which the alleged issue of plaintiff's purported contributory negligence would be relevant in this case would be if the jury based its verdict *only* on a cause of action not arising under the Safety Appliances Act. If the jury found against petitioner on *either* of the Safety Appliances Act violations, the

question of plaintiff's alleged negligence is irrelevant. It was only if *neither* Safety Appliances Act violation was the basis for the jury's decision that the issue of plaintiff's alleged negligence would even enter into this case. The facts of this case and the evidence emphasized at the trial demonstrate to a certainty that the jury's verdict was based on at least one, and probably both, Safety Appliances Act violations, which were the immediate cause of the accident.

And, in any event, it was incumbent on petitioner to prove otherwise, and to establish that the jury decided this case *only* on a cause of action as to which any alleged contributory negligence would be relevant. This, petitioner wholly failed to do, because it sought to gamble on the verdict, did not request any special verdict, and acquiesced and agreed to the rendition of a general verdict.

California authority makes it clear that where a general verdict is rendered, and one or more of the causes of action proven are unaffected by any error, any alleged or claimed error committed with respect to another cause of action cannot be prejudicial and is immaterial (See Opinion of the California Court of Appeal, App. A, at pp. 5-7, and authorities cited therein). This rule has been uniformly applied to FELA actions. See, *e.g., King v. Schumacher,* 32 Cal.App.2d 172, 178-180, cert. den., 308 U.S. 593; *Walton v. Southern Pac. Co.,* 8 Cal.App.2d 290, 305, cert. den., 296 U.S. 647; *Edgington v. Southern Pac. Co.,* 12 Cal.App.2d 200, 206. It is applicable with even more force herein, since as noted above, the causes of action for the two Safety Appliances Act violations were the major issues in the subject trial, and there was little,

if any, attention given to the other cause of action. Moreover, a litigant is not permitted to gamble on the verdict; such litigant may not omit to take steps to establish the basis of the jury's decision, and then after an adverse verdict is rendered, claim that said verdict was based on a cause of action which was purportedly the subject of some alleged error.

As the California Court said in *Codekas v. Dyna-Lift Co.,* 48 Cal.App.3d 20:

> "*parties should have one chance to have a jury's fact finding pinpointed; this can be accomplished by requesting special verdicts or findings* (Code Civ.Proc., §§624, 625); *a losing party should not be permitted to drag litigation through the appellate courts by turning his back on safeguards afforded by the Legislature; . . . the responsibility for requesting special verdict forms rests with the party who loses the verdict (the appellant).*" 48 Cal.App.3d at pp. 24-25. Emphasis added.

Petitioner has wholly failed to explain its omission to request a special verdict. Although it criticizes the above-quoted California rule (Petition at p. 12), *it does not deny its application,* and it apparently wishes this Court to decree that this rule violates some federal concept (*ibid.*). However, petitioner cites no authority whatever for the proposition that there is *any* federal question, much less a federal question of a magnitude that would concern this Court, from a State rule discouraging gambling on verdicts and requiring that special verdicts be rendered to preserve on appeal a point such as the one petitioner purports to raise here.

2. In Any Event, There Was No Evidence of Contributory Negligence on the Part of Plaintiff.

In attempting to conjure up some contention that uniformity is somehow involved herein, petitioner first contends that there is a conflict as to whether under the FELA the tests of negligence and proximate cause are the same when it is the employee's negligence that is in question as when it is the employer's negligence that is in question (see, *e.g.*, Petition at p. 11). However, the Opinion of the California Court of Appeal demonstrates that said Court applied the test and rule contended for by petitioner. The Court of Appeal said: "the sufficiency of the evidence to take the issue of contributory negligence to the jury is to be tested by the same liberal standards that are used to test the sufficiency of plaintiff's evidence on the issues of negligence and proximate cause." (App. A at p. 3, 3rd paragraph).

Similarly, the Court of Appeal applied the test for the existence of evidence of negligence and causation contended for by petitioner, noting that the "slightest evidence of negligence or causation is sufficient to take the case to the jury under the FELA" (Opinion at p. 3), and then quoting extensively from this Court's decision in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506-507, the decision petitioner urges applies herein (Petition at pp. 9-11). Applying these tests, the Court of Appeal concluded that there was no evidence of any contributory negligence on the part of plaintiff, for the reasons set forth at pages 4-5 of the Opinion.

In view of the foregoing, and in view of the immateriality of this purported issue in any event (subsection

1, *supra*), we do not believe it necessary to enter into a more detailed discussion of the facts involved herein.[2]

B.

Petitioner's Contention With Respect to the "Income Tax" Instruction Is Wholly Without Merit.

There are two separate and distinct questions involved with respect to the effect of income taxes on damages in FELA cases. One question is substantive and its resolution may have an important impact on the size of the damages awarded. The other question is procedural and innocuous and has no effect other than as a redundant and unnecessary cautionary instruction. It is *only* the second question that is involved herein, *and even the cases relied on by petitioner* (Petition at pp. 12-14) *hold that the failure to comply with the rule laid down in said cases with respect to this question does not constitute reversible error.*

The first question, the substantive question, is whether the jury should deduct from a disabled plaintiff's award for loss of earnings and loss of earning capacity that portion of said earnings it may find would not be received by a plaintiff by reason of income taxes. That question thus involves the method

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[2]It should also be noted that, in setting up the alleged facts, petitioner cited no record references, and its statement of the facts contains omissions and misstatements. We shall not burden this Court by detailing these omissions and misstatements, but it should be noted, for example, that the evidence established that the chocks petitioner furnished consisted of two inch by two inch pieces of soft pine, which petitioner intended to be used to hold two railroad cars, one of which alone weighed 150,000 pounds [R.T. 120, 121, 162-163, 200]. To contend that the failure of this piece of flimsy wood to hold such weight furnishes an inference that plaintiff was negligent, is, we submit, a vacuous contention.

by which the jury should compute a plaintiff's damages for these items, *i.e.*, on a "gross" basis or net after taxes. *That question is not involved in this case.*

The second question is whether the jury should be instructed that any award of damages to plaintiff will not be subject to income taxation. This instruction is basically a redundant instruction designed to avoid the remote possibility that the jury will disregard the other instructions given it as to the items of damages to be awarded and will add to the award an amount to compensate for income taxation. The California Courts have uniformly held that it is not error to refuse this instruction. *Henninger v. Southern Pac. Co.*, 250 Cal.App.2d 872; *Atherley v. MacDonald, Young and Nelson*, 142 Cal.App.2d 575. These holdings essentially state that where (as here [R.T. 423-426]) the jury has been specifically instructed as to the specific items of damages which plaintiff could be awarded, and specifically directed that "speculative" or "remote" or "conjectural" damages should not be awarded, there is no necessity to specifically advise the jury with respect to income taxes, or even to mention taxes. See *Henninger, supra*, 250 Cal.App.2d at pp. 879-880; Appendix A annexed to Petition, at pp. 9-10. In reliance on these holdings, the Trial Court herein refused the "tax" instruction. Subsequently, the case of *Burlington Northern Inc. v. Boxberger*, 529 F.2d 284 (9th Cir. 1975) was decided, and petitioner's contention is, in effect, that this case changed the law and requires that *all* pending FELA and Jones Act cases already tried in California which followed the rulings of the *Henninger* and *Atherley* cases must be reversed on appeal.

However, petitioner omits to advise this Court that it has been uniformly held, *even in jurisdictions that require the instruction to be given,* that the failure to give it is *not* reversible error. Thus, in *Boxberger, supra,* the judgment was reversed by reason of the Court's ruling on the first question, the substantive question of whether loss of earnings should be assessed on a "gross" or "net" basis. And in *Domeracki v. Humble Oil & Refining Co.*, 443 F.2d 1245 (3rd Cir. 1971), the other authority primarily relied on by petitioner (Petition at pp. 12-14), the Court did hold that the "income tax" instruction should be given, but it also held that this rule would be applied *only prospectively*. See 443 F.2d 1245, 1252.

And in *Geris v. Burlington Northern, Inc.*, 561 P.2d 174 (Sup. Ct. Ore. 1977), the Oregon Supreme Court, after holding that the "income tax" instruction should be given in future cases, stated as follows:

> "However, *we have been unable to discover any case, state or federal,* in which the trial court has been reversed and a new trial ordered solely on the grounds that the court failed to instruct the jury that any damages awarded would not be treated as income in the year received." 561 P.2d at p. 183. Emphasis added.

See also: *McWeeney v. New York, N.H. & H.R.R. Co.*, 282 F.2d 34 (2d Cir. 1960); *Rouse v. Chicago, Rock Island & P.R. Co.*, 474 F.2d 1180 (8th Cir. 1973); *Dempsey v. Thompson*, 251 S.W.2d 42, 45-46 (Sup. Ct. Mo. 1952).

The reason that the refusal to give the "income tax" instruction is not reversible error is manifest. As the California Court of Appeal said at bar: "the requested instruction does not affect either the definition of a cause of action under the F.E.L.A. or the measure

of damages; it is a matter of general advice which may be thought useful for the purpose of heading off improper speculation on the taxability of a verdict." (Opinion at pp. 10-11). And the instruction is plainly a cautionary instruction of the type that is "usually held to be discretionary with the trial court" (*Geris, supra,* 561 P.2d at p. 183. See also: *McWeeney, supra, Rouse, supra*).

It is therefore plain that petitioner is attempting to consume the time of this Court and to hinder and delay respondent on the basis of the giving of an innocuous, redundant instruction *that petitioner's own authorities hold does not constitute a ground for reversal of the judgment.*[3] Thus, contrary to petitioner's representations to this Court (Petition at p. 13), there is no conflict on this "issue."[4]

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[3]Petitioner makes the bald statement that the award herein is "significantly out of proportion to respondent's" damages (Petition at p. 13) and that this "may have occurred" because the jury compensated the plaintiff for the effect of taxes (*ibid.*). However, petitioner has not set forth any evidence to support these statements and, in fact, the uncontradicted evidence at the trial establishes that plaintiff had sustained an excruciating, painful and disabling permanent injury [*e.g.,* R.T. 32-35, 82-85, 88, 90, 91-95], with a large accompanying monetary loss, a loss which more than amply justified the size of the verdict.

[4]In view of the foregoing, it is unnecessary for us to discuss the fact that the instruction should not be given, in any event, for a number of reasons which have been thoroughly canvassed in the various cases cited in the text. Because of its innocuous nature, we do not believe it is important whether the instruction is given or not, but we cannot conceptually ascertain why the fact that plaintiff is not required to pay income taxes out of the award should be singled out for a special instruction. If this is permitted, may the jury also be told that, for example, plaintiff *is* required to pay attorneys' fees out of the award?

Conclusion.

Petitioner's petition should be denied, and respondent should be awarded reasonable damages for his delay, pursuant to Rule 56, subdivision 4.

Respectfully submitted,

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and
LEONARD SACKS,
Attorneys for Plaintiff-Respondent, Ronald Dean Johnson.

APPENDIX I.

45 U.S.C. §12 provides:

12. Safety appliances, as designated by commission, to be standards of equipment—Modification of standard height of drawbars.—Within six months from the passage of this Act [Apr. 14, 1910] the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section two of this Act [§ 11 of this title] and section four of the Act of March second, eighteen hundred and ninety-three [§ 4 of this title], and shall give notice of such designation to all common carriers subject to the provisions of this Act [§§ 11-16 of this title] by such means as the commission may deem proper, and thereafter said number, location, dimensions, and manner of application as designated by said commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this Act [§§ 11-16 of this title], unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this Act [§§ 11-16 of this title]: Provided, That the Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which

any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the date of the passage of this Act [Apr. 14, 1910]. Said commission is hereby given authority, after hearing, to modify or change, and to prescribe the standard height of draw bars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the commission. (Apr. 14, 1910, c. 160, § 3, 36 Stat. 298.)

Title 49, Part 231 of the Code of Federal Regulations provides:

"§ 231.6 Flat cars.

(Cars with sides 12 inches or less above the floor may be equipped the same as flat cars.)

(a) *Hand brakes*—(1) *Number.* Same as specified for 'Box and other house cars' (see § 231.1(a)(1)).

(2) *Dimensions.* Same as specified for 'Box and other house cars' (see § 231(a)(2)).

(3) *Location.* (i) Each hand brake shall be so located that it can be safely operated while car is in motion.

(ii) The brake shaft shall be located on the end of car to the left of center, or on side of car not more than 36 inches from right-hand end thereof.

(iii) Carriers are not required to change the brakes from right to left side on steel or steel-underframe cars with platform end sills, in service July 1, 1911, except when such appliances are renewed, at which time they must be made to comply with the standards prescribed.

(iv) Carriers are not required to change the location of brake wheels and brake shafts on cars in service July 1, 1911, where the appliances are within 3 inches of the required location, except that when cars undergo regular repairs they must then be made to comply with the standards prescribed.

(4) *Manner of application.* Same as specified for 'Box and other house cars' (see § 231.1(a)(4))."

APPENDIX II.

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THE FIRST APPELLATE DISTRICT, DIVISION FOUR

RONALD DEAN JOHNSON, Plaintiff and Respondent, vs. SOUTHERN PACIFIC TRANSPORTATION COMPANY, a corporation, Defendant and Appellant.	NO. 1/CIV. 38036

MOTION TO STAY ISSUANCE OF REMITTITUR; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF B. CLYDE HUTCHINSON, ESQ.; AND ORDER

Appellant SOUTHERN PACIFIC TRANSPORTATION COMPANY hereby moves the above-entitled Court for an order staying issuance of the remittitur in this cause until the time stated in the attached order. This motion is made on the ground that Appellant intends to submit a petition for a writ of certiorari to the United States Supreme Court in the above-entitled matter. This motion is based on the attached Memorandum of Points and

Authorities and Declaration of B. Clyde Hutchinson, Esq.

Dated: March 31, 1977.

DUNNE, PHELPS & MILLS

By: B. Clyde Hutchinson

B. Clyde Hutchinson
Attorneys for Appellant Southern
Pacific Transportation Company

MEMORANDUM OF POINTS AND AUTHORITIES

A reviewing court, for good cause, may stay the issuance of a remittitur for a reasonable period. (Cal. Rules of Court, Rule 25(c)). It has been held that issuance of a remittitur may be stayed in order that a party, before execution of judgment, may have an opportunity to prepare and file a petition for a writ of certiorari in the United States Supreme Court. (Severns Drilling Co. v. Superior Court (1936) 16 Cal. App. 2d 435); Reynolds v. E. Clemens Horst Co. (1918) 36 Cal. App. 529; see Cont. Ed. Bar, California Civil Appellate Practice, §15.101, p. 544.)

DECLARATION OF B. CLYDE HUTCHINSON, ESQ.

I am an attorney duly admitted to practice before the above-entitled court and a member of the firm of Dunne, Phelps & Mills and as such am attorney for Appellant Southern Pacific Transportation Company in this matter.

This is an appeal from a judgment that awarded $460,587.13 to respondent Ronald Dean Johnson on causes of action under the Federal Employer's Liability Act (45 U.S.C. §51 et seq.) and the Federal Safety

Appliance Act (45 U.S.C. §11 et seq.). The judgment was affirmed by the above-entitled court (per Christian, J.) in an opinion filed on January 27, 1977. Appellant's petition for a hearing in the California Supreme Court was denied on March 24, 1977.

Appellant intends to prepare and submit a petition for a writ of certiorari to the United States Supreme Court. It is believed by the undersigned that, due to certain issues involving the Federal Employer's Liability Act and the Safety Appliance Act to be presented therein, the said petition will be meritorious and will be considered seriously by the Supreme Court.

If the instant motion is granted, Appellant will submit its petition for a writ of certiorari to the United States Supreme Court on or before the sixtieth day thereafter. Execution of the instant judgment during the pendency of the said petition would subject appellant to substantial hardship and to the risk of irreparable harm.

Appellant accordingly requests that issuance of the remittitur be stayed for a period of sixty days, or such other period as the court may direct, and in the event Appellant's petition for a writ of certiorari is submitted at or before the end of that period, until ten days after the U. S. Supreme Court passes upon the said petition. The undersigned will notify the Clerk of the Court of Appeal of the action taken by the U. S. Supreme Court on or before the tenth day after such action is taken.

Respondent will be protected from loss during the period of the stay requested herein, since Appellant has filed an undertaking in the amount of one and one-half times the amount of the judgment pursuant to Code

of Civil Procedure §917.1

Executed on March 31, 1977, at San Francisco, California.

I declare under penalty of perjury that the foregoing is true and correct.

B. Clyde Hutchinson

B. Clyde Hutchinson

ORDER STAYING ISSUANCE OF REMITTITUR

FOR GOOD CAUSE, IT IS ORDERED that issuance of the remittitur in the above-entitled action be and is stayed for a period of sixty days from the date set forth below, and in the event Appellant submits a petition for a writ of certiorari to the U. S. Supreme Court at or before the end of that period, until ten days after the Supreme Court passes on the said petition.

Dated:

Presiding Justice

APPENDIX III.

Court of Appeal of the State of California

COPY

IN AND FOR THE

First Appellate District

Division FOUR

Ronald Dean Johnson,
Plaintiff and Respondent,
vs.
Southern Pacific Transportation Company, etc.,
Defendant and Appellant.

No. 38036

BY THE COURT:

The motion to stay issuance of remittitur is denied.

Dated APR 26 1977

RATTIGAN, J. ACTING P.J.

APPENDIX IV.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Petitioner,

vs.

RONALD DEAN JOHNSON,

Respondent

APPLICATION FOR STAY OF REMITTITUR OF CALIFORNIA COURT OF APPEAL AND STAY OF EXECUTION OF JUDGMENT

Appearance: B. Clyde Hutchinson
DUNNE, PHELPS & MILLS
601 California Street
San Francisco, California 94108
Telephone: (415) 986-4812

Attorneys for Petitioner
Southern Pacific
Transportation Company.

To the Honorable William Rehnquist, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Petitioner Southern Pacific Transportation Company (hereinafter "Petitioner") prays that an order will be entered staying issuance of the remittitur of the California Court of Appeal,

First Appellate District, Division Four (hereinafter "the Court of Appeal"), and staying execution and enforcement of the judgment of the Superior Court of the State of California, City and County of San Francisco (hereinafter "the trial court") pending the filing of a petition for certiorari in the above-entitled case and a final determination of the matter by this Court. In support of this application, Petitioner respectfully submits as follows:

1. Respondent Ronald Dean Johnson (hereinafter "Respondent") brought this action against Petitioner under the Federal Employer's Liability Act (45 U.S.C. §51 et seq.) and the Federal Safety Appliance Act (45 U.S.C. §11 et seq.) for injuries allegedly sustained while acting as Petitioner's employee. Pursuant to a jury verdict, the trial court entered judgment for Respondent in the amount of $460,587.13. The judgment was affirmed by the Court of Appeal in an opinion filed on January 27, 1977, a copy of which is attached hereto as "Exhibit A." Petitioner's timely petition for a rehearing was denied by the Court of Appeal on February 18, 1977. Petitioner's timely petition for a hearing in the California Supreme Court was denied on March 24, 1977.

2. On March 31, 1977, Petitioner filed a Motion to Stay Issuance of Remittitur in the Court of Appeal. The ground of the said motion was to permit Petitioner, prior to execution of judgment in the trial court, to prepare and file a petition for certiorari in the United States Supreme Court. In California practice, the remittitur constitutes the final process of the appellate court and issuance of the remittitur causes jurisdiction to be vested in the trial court for enforcement of the judgment or other purposes. (6 Witkin, California Practice (2d ed.) Appeal, §516, 520.) A motion to stay issuance of remittitur is an appropriate means to prevent execution of judgment pending

disposition of a petition for certiorari in the United States Supreme Court. (Severns Drilling Co. v. Superior Court (1936) 16 Cal. App. 2d 435; Reynolds v. E. Clemens Horst Co. (1918) 36 Cal. App. 529.) Nevertheless, Petitioner's Motion to Stay Issuance of Remittitur was denied without opinion by the Court of Appeal on April 26, 1977.

3. The jurisdiction of this court to review this case on petition for certiorari rests upon 28 U.S.C. §1257(3). Jurisdiction to issue the stay requested herein is granted by 28 U.S.C. §2101(f).

4. In determining the appropriateness of a stay of proceedings in a lower court, a Circuit Justice must inquire as to whether any of the matters proposed to be raised in the petition for certiorari are "sufficiently debatable to lead to the belief that at least four members of the Court would vote to grant certiorari" or some form of interim relief. (Edwards v. United States, 76 S. Ct. 1058, 1059 (Opinion of Mr. Justice Harlan as Circuit Justice).) Petitioner submits that there are at least two major issues to be raised in the petition which warrant a stay under this standard:

(a) A principal reason for seeking certiorari in this case is to test the ruling of the Court of Appeal that the trial court did not commit error when it refused to instruct the jury that any award made to respondent would not be subject to income taxation. In Burlington Northern, Inc. v. Boxberger (1975) 529 F 2d 284, the U.S. Court of Appeals for the Ninth Circuit held that such an instruction must be given in personal injury actions brought under the Federal Employer's Liability Act. (Id. at 295-297.) A similar holding was made by the Court of Appeals for the Third Circuit in Domeracki v. Humble Oil & Refining Co. (1971) 443 F 2d 1245, cert. den. 404 U.S. 883. In

other circuits, however, the refusal of a trial judge to give an instruction of the described nature has been upheld. (Nichols v. Marshall (10th Cir. 1973) 486 F. 2d 791; Elston v. Shell Oil Co. (5th Cir. 1973) 481 F. 2d 608; McWeeney v. New York, New Haven & Hartford R.R. (2d Cir. 1966) 282 F. 2d 34, 39, cert. den. 364 U.S. 870; New York Central R.R. Co. v. Delich (6th Cir. 1958) 252 F. 2d 522; see Rouse v. Chicago R. I. & P. R. R. Co. (8th Cir. 1973) 474 F. 2d 1180.) Accordingly, there is a conflict in the circuits on this question. In the case at bench, the absence of a clear federal rule was cited by the Court of Appeal as a reason for applying the California rule that such an instruction is not required in personal injury actions. (Opinion, Exhibit A, p. 11.) This Court should establish a uniform federal rule requiring that juries be informed of the non-taxability of awards and should make such a rule applicable in all actions brought in the state courts under the Federal Employer's Liability Act. In the absence of such a holding by this Court, different rules will continue to prevail among the state and lower federal courts with consequent inconsistency in the amount of jury awards. Moreover, at least in the Ninth Circuit, such a condition might lead to forum-shopping between the federal and state courts in F.E.L.A. actions.

(b) Another reason for seeking certiorari in this case is that the decision of the Court of Appeal is in direct conflict with decisions of this Court and other federal courts concerning the quantum of evidence necessary to require submission of the issue of contributory negligence to the jury in an action brought under the Federal Employer's Liability Act. It has been held that the sufficiency of the evidence to take the issue of contributory negligence to the jury in such actions is to be tested by the same liberal standards that are used to test the

sufficiency of the plaintiff's evidence on the issues of negligence and proximate cause. (Page v. St. Louis Southwestern Railway Co. (5th Cir. 1965) 349 F. 2d. 820, 824; Ganotis v. New York Central Railroad Co. (6th Cir. 1965) 342 F. 2d. 767, 768; Mumma v. Reading Co. (E.D. Pa. 1965) 247 F. Supp. 252, 254.) Moreover, paramount cases involving the F.E.L.A. establish that a very slight degree of evidence is sufficient to take the issue of contributory negligence to the jury. (see, e.g., Gallick v. Baltimore and Ohio Railroad Company (1963) 372 U.S. 108, Webb v. Illinois Central Railroad Company (1957) 352 U.S. 12: Lavender v. Kurn (1945) 327 U.S. 645, Tennant v. Peoria and Pekin Union R. Co. (1943) 321 U.S. 2d.) The ruling of the Court of Appeal on the issue of contributory negligence is in conflict with the standard established by the cited cases. Moreover, since at least one published state decision departs from the described standard and holds that the common law test of proximate cause is applicable to an employee's contributory negligence in a F.E.L.A. action but not to the negligence of the defendant (Missouri-Kansas-Texas R.R. Co. v. Shelton (Tex. Civ. App. 1964) 383 S.W. 2d 842, 846.), this Court should make a clarifying ruling concerning the manner and circumstances in which the issue of contributory negligence should be submitted to the jury in such a case.

6. Petitioner expects that Respondent will apply for a writ of execution in the trial court immediately upon issuance of the remittitur by the Court of Appeals. If such a writ of execution is obtained and the judgment is satisfied, Petitioner will be subjected to a strong risk of irreparable harm. If the judgment is satisfied and this Court thereafter grants the petition for a writ of certiorari and reverses the decision of the Court of Appeal, it will be virtually impossible for Petitioner to obtain repayment of the full amount of the judgment. This prejudicial result will be avoided, however, if the stay requested

herein is granted. Moreover, Respondent will not suffer any damage if such a stay is granted, since Petitioner has filed an undertaking in the trial court in the amount of one and one-half times the amount of the judgment pursuant to California Code of Civil Procedure section 917.1. Further, in order to expedite proceedings in this Court, Petitioner will file its petition for certiorari on or before the 30th day after the stay requested herein is granted. Petitioner will undertake to act sooner if directed to do so by this Court.

WHEREFORE, Petitioner prays that this Court issue an order staying issuance of the remittitur for thirty days, and in the event Petitioner files its petition for certiorari and performs all acts necessary in connection therewith on or before the end of that period, until disposition of said petition by this Court. Further, since Petitioner has been informed by the Clerk of the Court of Appeal that the remittitur may be issued before this Court rules upon the instant application for a stay, Petitioner requests that the order of this Court also provide that, in the event the remittitur is issued before it can be stayed, execution and enforcement of the judgment in the trial court will likewise be stayed.

Dated: April 27, 1977

Respectfully submitted,

DUNNE, PHELPS & MILLS

By: B. CLYDE HUTCHINSON
B. Clyde Hutchinson

Attorneys for Petitioner Southern Pacific Transportation Company

APPENDIX V.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

April 29, 1977

B. Clyde Hutchinson, Esquire
Dunne, Phelps & Mills
601 California Street
San Francisco, California 94108

Re: Southern Pacific Transportation Company
v. Ronald Dean Johnson, A-892

Dear Mr. Hutchinson:

Your application for stay in the above-entitled case has been presented to Mr. Justice Rehnquist, who has endorsed thereon the following:

"Denied
WHR
4/28/77"

Very truly yours,

MICHAEL RODAK, JR., Clerk

By

Peter K. Beck
Assistant Clerk

th

cc: O'Connor, Sevey & Gessford
429 J Street
Sacramento, California 95814

Leonard Sacks, Esquire
15910 Ventura Blvd., Suite 1833
Encino, California 94136

APPENDIX VI.

DUNNE, PHELPS & MILLS
601 California Street
San Francisco, California 94108
Telephone: 415/986-4812

Attorneys for Defendant Southern
Pacific Transportation Company

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

RONALD DEAN JOHNSON,

Plaintiff,

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a corporation,

Defendant.

NO. 654 557

MAY 31 1977

ORDER STAYING EXECUTION AND ENFORCEMENT OF JUDGMENT

Ronald Dean Johnson, plaintiff, by his attorneys of record, O'Connor, Sevey & Gessford, and Southern Pacific Transportation Company, defendant, by its attorneys of record, Dunne, Phelps & Mills, having executed and filed this date a stipulation providing for a stay of execution and enforcement of the judgment heretofore entered in this action on January 25, 1975, and good cause appearing,

IT IS HEREBY ORDERED that enforcement of the judgment heretofore entered in the above-entitled action in favor of plaintiff Ronald Dean Johnson and against Southern Pacific Transportation Company and execution on said judgment be and hereby is stayed for a period of thirty days from the date of this Order.

IT IS FURTHER ORDERED that, in the event defendant Southern Pacific Transportation Company files a petition for certiorari and performs all other acts necessary to seek review of the case by the Supreme Court of the United States of America on or before the end of said thirty day period, enforcement of said judgment and execution thereon be and is stayed until said Supreme Court rules upon said petition and, thereafter, subject to further order of this Court.

Dated: May 24, 1977.

[illegible]
Judge of the Superior Court